

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AMERICAN FAST FREIGHT, INC. and
HAWAIIAN OCEAN TRANSPORT,
INC.,

Plaintiffs,

v.

NATIONAL CONSOLIDATION &
DISTRIBUTION, INC., a New Jersey
corporation; NEW CONCEPT
DISTRIBUTION, INC., a Nevada
corporation; NCD GLOBAL, INC., a New
Jersey corporation; NCD COMPANIES,
INC., a corporation,

Defendants.

CASE NO. C07-716BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
COMPEL DISCOVERY,
GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION TO
EXTEND DISCOVERY
DEADLINE AND CONTINUE
TRIAL DATE, AND GRANTING
IN PART AND DENYING IN
PART PLAINTIFFS' MOTION
FOR PROTECTIVE ORDER

This matter comes before the Court on Defendants' Motion to Compel Discovery (Dkt. 73), Defendants' Motion to Extend Discovery Deadline and Continue Trial Date (Dkt. 75), and Plaintiffs' Motion for Protective Order (Dkt. 77). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants in part and denies in part the motions for the reasons stated herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 8, 2007, American Fast Freight, Inc. ("American Fast Freight") and its wholly-owned subsidiary, Hawaiian Ocean Transport, Inc., brought suit in federal court against National Consolidation & Distribution, Inc. Dkt. 1. On August 7, 2007, Plaintiffs

1 filed an amended complaint adding New Concept Distribution, Inc., NCD Goba, Inc., and
2 NCD Companies, Inc. as parties. Dkt. 15. The facts, according to the amended complaint,
3 are as follows: In 2002, Defendant NCD, Inc. entered into an arrangement with Plaintiffs to
4 transport goods from various locations in the continental United States for delivery to
5 Alaska and Hawaii. Dkt. 15 at 4. On March 15, 2002, NCD, Inc. signed a Credit
6 Application to do business with Plaintiffs. *Id.* Plaintiffs signed and approved the Credit
7 Application. Under the Credit Application, Defendants agreed to advance the freight
8 charges due to American Fast Freight by paying American Fast Freight's invoices. The
9 Credit Application provided that the invoices were due and payable immediately, that the
10 invoices would become past due if not paid within 30 days of the invoice date, that a 1.5%
11 late payment penalty applied to all unpaid or past due balances, and that American Fast
12 Freight was authorized to sue Defendants to collect such unpaid or past due amounts. *Id.* at
13 4.

14 Plaintiffs contend that Defendants have failed to pay amounts due and owing for the
15 transportation of goods to Alaska and Hawaii. *Id.* at 5. Plaintiffs sue for breach of contract
16 and unjust enrichment and contend that the Court should disregard Defendants' corporate
17 form. *Id.* at 4-6. Several interrelated discovery motions are currently pending before the
18 Court.

19 II. DISCUSSION

20 A. MOTION TO STRIKE

21 As a threshold matter, Plaintiffs ask the Court to strike Defendants' Reply to
22 Plaintiffs' Opposition to Motion to Extend Discovery and Continue Trial Date (Dkt. 88).
23 Dkt. 92. Plaintiffs contend that the reply brief was not timely filed and offers arguments
24 that are not made in strict reply to Plaintiffs' opposition.

25 Defendants' Motion to Extend Discovery Deadline and to Continue Trial Date (Dkt.
26 75) was noted for consideration on February 12, 2008, pursuant to Local Rule CR
27 7(d)(2)(A). Defendants' reply was due on or before the noting date. Local Rule CR 7(d)(2).
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1 Defendants' reply was filed on February 15, 2008. Dkt. 88. The caption of the reply
2 incorrectly lists February 15 as the noting date. Defendants' reply brief was untimely. The
3 Court surmises that the pendency of motions properly noted for consideration on February
4 15, 2008, may explain the untimely filing.

5 Defendants' motion was brief, cited only one case, and did not discuss the good
6 cause standard. Defendants' extensive briefing of the good cause standard in the reply brief
7 was arguably in reply to the authority offered by Plaintiffs.¹ In the interest of resolving the
8 parties' extensive discovery dispute on its merits, the Court declines to strike the reply.

9 **B. CONTINUANCE OF TRIAL DATE AND DISCOVERY DEADLINE**

10 Pending before the Court is Defendants' Motion to Extend Discovery Deadline and
11 Continue Trial Date (Dkt. 75). Specifically, Defendants seek a 60-day extension of the trial
12 date and discovery deadlines because Plaintiffs have not responded to requests for
13 production and because Plaintiffs' representatives have not yet been deposed. Dkt. 75 at 3.
14 Defendants would like an extension of the trial and discovery deadlines to allow for
15 deposition of Plaintiffs' representatives after having received documents responsive to their
16 requests for production. *See* Dkt. 76 at 3.

17 The discovery deadline in this matter was February 15, 2008. Dkt. 53. Trial is set for
18 May 19, 2008. Dkt. 50. Defendants issued their first deposition subpoenas on January 25,
19 2008, one week after Plaintiffs responded to Defendants' second set of requests for
20 production. Dkt. 80 at 2. Defendants noted the depositions for dates after the close of
21 discovery to coincide with Defendants' counsel's trip to San Francisco. Dkt. 76 at 2.

22 Trial courts have broad discretion in deciding whether to grant or deny a request for
23 a continuance. *U.S. v. Flynt*, 756 F.2d 1352, 1358 (1985), *amended by* 764 F.2d 675 (9th
24 Cir. 1985). Under Federal Rule of Civil Procedure 6, the Court may grant an extension of
25 time for good cause. Fed. R. Civ. P. 6(b).

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27 ¹The Court also notes that Defendants' reply was overlength. *See* Local Rule CR 7(e)(2) (Reply briefs on
28 motions noted under Local Rule CR 7(d)(2) shall not exceed six pages.).

1 Plaintiffs oppose an extension because they contend that Defendants have not
2 diligently pursued discovery. Dkt. 79. Plaintiffs also contend that a continuance would be
3 prejudicial. Specifically, Plaintiffs contend that a continuance would afford Defendants
4 additional time to “dissipate the funds and assets on which the Plaintiffs will rely to enforce
5 a judgment,” would result in Plaintiffs incurring additional damages, and would hinder
6 Plaintiffs’ ability to prepare for trial. Dkt. 79 at 8. The Court notes that Plaintiffs recently
7 requested a thirty-day continuance of the trial date. *See* Dkt. 56.

8 In light of Defendants’ receipt of Plaintiffs’ discovery responses on January 14 and
9 January 18, the Court cannot conclude that Defendants’ discovery practice has lacked
10 diligence. The Court therefore concludes that a brief trial continuance is proper. A 60-day
11 continuance of the pretrial deadlines is warranted, but Defendants’ proposed trial date of
12 July 21, 2008, cannot be accommodated by the Court’s trial calendar. Trial in this matter is
13 therefore continued to September 15, 2008.

14 **C. DEFENDANTS’ MOTION TO COMPEL DISCOVERY**

15 Federal Rule of Civil Procedure 26 governs discovery and provides, in part, as
16 follows:

17 Parties may obtain discovery regarding any nonprivileged matter that
18 is relevant to any party's claim or defense--including the existence,
19 description, nature, custody, condition, and location of any documents or
20 other tangible things and the identity and location of persons who know of
21 any discoverable matter. *For good cause, the court may order discovery of
any matter relevant to the subject matter involved in the action. Relevant
information need not be admissible at the trial if the discovery appears
reasonably calculated to lead to the discovery of admissible evidence. All
discovery is subject to the limitations imposed by Rule 26(b)(2)(C).*

22 Fed. R. Civ. P. 26(b)(1) (emphasis in original). Discovery must be limited if the Court
23 determines that the discovery sought is unreasonably cumulative or duplicative or is
24 obtainable from a more convenient, less burdensome, or less expensive source; that the
25 seeking party has had ample opportunity to obtain the information sought; or that the
26 burden or expense of the discovery request outweighs its likely benefit. Fed. R. Civ. P.
27 26(b)(2)(C).
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1 If a party fails to answer an interrogatory or a request for production, the party
2 may move to compel disclosure pursuant to Federal Rule of Civil Procedure 37. Fed. R.
3 Civ. P. 37(a)(3)(B). The motion must certify that the parties have made a good faith
4 effort to confer and resolve the dispute themselves. Fed. R. Civ. P. 37(a)(1). A good faith
5 effort to confer “requires a face-to-face meeting or a telephone conference.” Local Rule
6 CR 37(a)(2)(A). Counsel for both parties conferred on January 28, 2008, and were
7 unable to resolve this discovery dispute without Court intervention. Dkt. 74 at 2.

8 On August 7, 2007, pursuant to the parties’ stipulation, Plaintiffs filed an
9 amended complaint adding “disregard of corporate entity” as a third claim for relief. Dkt.
10 15 (amended complaint); Dkt. 13 (stipulation). On November 29, 2007, Defendants
11 served their first set of interrogatories and requests for production. Dkt. 80 at 1. Plaintiffs
12 contend that these discovery requests sought thousands of pages of documents Plaintiff
13 previously provided to Defendants. Dkt. 79 at 2. On December 17, 2007, Defendants
14 served Plaintiffs with their Second Set of Interrogatories and Second Request for
15 Production of Documents. Dkt. 74 at 2.

16 Plaintiffs responded to the first and second sets on January 14, 2008, and January
17 18, 2008, respectively. Dkt. 80 at 1-2. As part of Plaintiffs’ response to the discovery
18 requests, Plaintiffs made approximately 25,500 pages of documents available for
19 inspection and copy by Defendants. Dkt. 80 at 2. Defendants asked Plaintiffs to
20 reproduce the documents as their resources allowed, and Plaintiffs did so without charge
21 on January 31, 2008. Dkt. 80 at 2; Dkt. 80, Exh. 1 at 6. Plaintiffs objected on relevance
22 grounds to many of the requests, and Defendants now move to compel production of
23 documents responsive to Requests 1- 7, 9-10, 18-28, and 31-38 in Defendants’ second
24 set of discovery requests within seven days. Dkt. 73. Plaintiffs move for a protective
25 order sustaining their objections. Dkt. 77.

26 Plaintiffs object to discovery requests which seek information regarding
27 Plaintiffs’ corporate form because Defendants seek to use this information to establish
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1 that Plaintiffs and other businesses in the trucking industry employed similar practices
2 with respect to the corporate form. In other words, Defendants seek to avoid piercing of
3 the corporate veil by demonstrating that Plaintiffs' corporate structure is similar.

4 **1. Plaintiffs' Corporate Information**

5 Defendants seek production of documents relating to Plaintiffs' corporate status
6 (Requests 1, 3-6), employment information regarding Plaintiff's chief executive officer
7 (Request 2), Plaintiff's financial statements and tax returns (Requests 7-8, 31), and
8 Plaintiffs' bank and accounting documents (Requests 9, 20-28). *See* Dkt. 74, Exh. A at 7-
9 8. Plaintiffs object, contending that this information is irrelevant. Defendants contend
10 only that this information is relevant to Plaintiffs' request that the Court pierce
11 Defendants' corporate veil. Specifically, Defendants seek to establish that their corporate
12 structure is typical in the trucking industry with evidence that their corporate structure is
13 similar to Plaintiffs' corporate structure. Dkt. 73 at 6.

14 Defendants do not offer, and the Court's research has not revealed, legal authority
15 for the proposition that typical industry practices are relevant when deciding whether to
16 pierce the corporate form. *But see Cotracom Commodity Trading Co. v. Seaboard Corp.*,
17 189 F.R.D. 655, 667 (D. Kan. 1999) ("Plaintiffs may not attack an attempt to pierce their
18 corporate veil by showing that others in the industry behave the same way."); *In re*
19 *Catfish Antitrust Litigation*, 908 F. Supp. 400, 417 (N.D. Miss. 1995) (noting that the
20 level of a parent company's control over a subsidiary is not established by industry
21 norms).

22 Defendants also contend that Plaintiffs' expert has put this issue in controversy
23 because his report includes the following statements: "It is unusual for a company with
24 revenue of \$1 million to have no or such small salary expense," Defendants' executive
25 vice president and corporate secretary's compensation is "extremely high," and "[t]ruly
26 independent companies do not combine funds in a common concentration account." Dkt.
27 90, Exh. 2 at 9, 15-16. The Court has reviewed the expert report and concludes that the
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1 report does not seek to establish typical industry practices and does not open the door to
2 discovery of such information. As to Requests 1-9, 20-28, and 31, Defendants' Motion to
3 Compel Discovery (Dkt. 73) is denied, and Plaintiffs' Motion for Protective Order (Dkt.
4 77) is granted.

5 **2. Account Receivable Aging Reports**

6 Defendants seek production of Plaintiff's account receivable aging reports. *See*
7 Dkt. 74, Exh. A at 9 (Request 10). Defendants contend that these documents will identify
8 the names of Plaintiffs' customers and will therefore demonstrate that Plaintiffs knew the
9 precise identities of the Defendant with which they were transacting. Dkt. 73 at 7; Dkt.
10 81 at 4. Defendants do not seek this information for purposes of ascertaining information
11 about Plaintiffs' other customers and suggest that the aging reports could be designated
12 confidential pursuant to the protective order previously entered in this case. Dkt. 81 at 4.
13 Plaintiffs contend that they have already offered the account of all Defendants in this
14 matter. Dkt. 91 at 4. Defendants having failed to demonstrate the relevance of aging
15 accounts pertaining to customers not a party to this matter, Defendants' Motion to
16 Compel Discovery (Dkt. 73) is denied, and Plaintiffs' Motion for Protective Order (Dkt.
17 77) is granted as to Request 10.

18 **3. Guaranties and Notes**

19 Defendants seek production of guaranties and notes obtained by third parties. *See*
20 Dkt. 74, Exh. A at 12 (Request 18). Defendants contend that Plaintiffs regularly obtained
21 guaranties from their customers but did not obtain a guaranty from National
22 Consolidation & Distribution, Inc. ("National") because Plaintiffs were not relying on
23 National's creditworthiness. Dkt. 73 at 8. Because Plaintiffs' claims involve equitable
24 concerns, the Court cannot conclude that Plaintiffs' use of guaranties to secure payment
25 would be wholly irrelevant. As to Request 18, Defendants' Motion to Compel Discovery
26 (Dkt. 73) is granted, and Plaintiffs' Motion for Protective Order (Dkt. 77) is denied.

4. Profit Margins

Defendants seek production of documents regarding Plaintiffs' profit margins for CompUSA shipments to Alaska and Hawaii on behalf of Defendants. *See* Dkt. 74, Exh. A at 12 (Request 19). Defendants contend that evidence of Plaintiffs' profits earned from transacting with NCD Global, Inc. would demonstrate that piercing of the corporate veil is not necessary to avoid inequity and would establish the value of the services rendered or benefit received with respect to Plaintiffs' unjust enrichment claim. Dkt. 73 at 8; Dkt. 87 at 7. Plaintiffs contend that this information is a trade secret due to Plaintiffs' status as freight forwarders or "middle men." *See* Dkt. 83.

Because Defendants' local counsel belongs to a law firm whose named partners serve on the board of directors of Plaintiffs' competitor, Plaintiffs are concerned that the protective order will not sufficiently protect information they consider confidential. *See id.* In responding to this contention, Defendants do not clarify whether the named partners would be entitled to receipt of documents pursuant to the protective order by virtue of their relationship to this case and despite their positions on the board of directors of Plaintiffs' competitor. It appears that evidence establishing the value of services rendered may be produced without requiring a broad disclosure of trade secrets regarding Plaintiffs' profit margins. Therefore, Defendants' Motion to Compel Discovery (Dkt. 73) is denied, and Plaintiffs' Motion for Protective Order (Dkt. 77) is granted as to Request 19. The parties should cooperate to facilitate limited discovery into this subject area in a way that would avoid the unnecessary disclosure of trade secrets.

5. Transconex, Inc.

Defendants seek production of financial and corporate information regarding Plaintiffs' former affiliate, Transconex, Inc. *See* Dkt. 74, Exh. A at 15-16 (Requests 32-38). Defendants contend that Transconex, Inc. is Plaintiffs' former subsidiary and that Plaintiffs knew they ran the risk of not being paid by NCD Global, Inc. by failing to secure a guaranty because Transconex, Inc.'s creditors were not paid when the company

1 failed financially. Dkt. 73 at 8-9. While such information may bear some relevance to
2 Plaintiffs' equitable claims, Defendants' requests are worded broadly to include in-depth
3 information regarding Transconex, Inc. Therefore, Defendants' Motion to Compel
4 Discovery (Dkt. 73) is denied, and Plaintiffs' Motion for Protective Order (Dkt. 77) is
5 granted as to Requests 32-38. The parties should cooperate to facilitate limited discovery
6 into this subject matter in a way that would avoid unnecessary burden and expense.


7 **III. ORDER**

8 Therefore, it is hereby

9 **ORDERED** that Defendants' Motion to Compel Discovery (Dkt. 73) and
10 Plaintiffs' Motion for Protective Order (Dkt. 77) are **GRANTED in part** and **DENIED**
11 **in part** as follows: Plaintiffs shall produce documents responsive to Request 18
12 forthwith. It is further

13 **ORDERED** that Defendants' Motion to Extend Discovery Deadline and
14 Continue Trial Date (Dkt. 75) is **GRANTED in part** and **DENIED in part** as follows:
15 The trial date in this matter is hereby continued to September 15, 2008, and the Clerk is
16 directed to issue a revised scheduling order to reflect the new trial date.

17 DATED this 26th day of February, 2008.

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22 BENJAMIN H. SETTLE
23 United States District Judge
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